Decision **DRAFT DECISION OF ALJ THOMAS** (Mailed 12/5/2003)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| In the Matter of the Application of Pacific Gas and Electric Company (U 39 E) for Commission Approval for Irrevocable Lease for Metromedia Fiber Network Services, Inc. to User Fiber Optic Cable on Certain PG&E Transmission Facilities Under Terms of an Optic Fiber Installation and IRU Agreement. | Application 01-03-008 (Filed March 8, 2001) |

# OPINION DENYING PACIFIC GAS AND ELECTRIC COMPANY'S PETITION FOR MODIFICATION OF DECISION 03-05-077

## I. Summary

We deny the petition of Pacific Gas and Electric Company (PG&E) for modification of Commission Decision (D.) 03-05-077 on the ground that the petition raises no issue of fact or law that warrant such modification.[1]

We disagree that D.03-05-077 wrongly states that the installation of optical fiber and related telecommunications equipment on existing utility structures by third-party telecommunications providers is not categorically exempt from environmental review under the California Environmental Quality Act (CEQA).

[1] Some of the claims PG&E raises here should properly have been raised in an Application for Rehearing, which PG&E did not file. Nonetheless, we opt to address PG&E request generally here because it may provide guidance to other parties.

We also disagree that D.03-05-077 contains factual errors relating to the use and benefits of the facilities installed under the Agreement at issue in this proceeding between PG&E and Metromedia Fiber Network Services (MFNS).

Finally, we reject PG&E's claim that D.03-05-077 inappropriately rejected as precedent certain Commission decisions issued before the Commission acknowledged that its approach to CEQA had evolved over time.

## II. Background

In D.03-05-077, the Commission permitted PG&E to grant MFNS an irrevocable license to use fiber optic cable crossing the San Francisco Bay on existing PG&E electric transmission towers parallel to the San Mateo Bridge. PG&E claimed that the San Mateo Bridge line was subject to a categorical exemption from CEQA on the ground it was a "minor alteration of existing facilities."

We noted that CEQA Guideline Section 15301 and Commission Rule 17.1(h)(1)(A)(2) provide for a CEQA exemption for such alterations. However, we stated that this exemption only applied to an electric utility for minor alterations to and for the purpose of its own electric service. We found that the modification of electric facilities to install new telecommunications lines was an expansion of the existing use of the facilities enabling telecommunications modernization. Thus, we concluded that the exemption did not apply. We concluded on balance, however, that there had been adequate consideration of the installation by the San Francisco Bay Conservation and Development Commission (BCDC), and noted that PG&E had consulted several other resource agencies. We therefore granted PG&E's request.

PG&E claims our determination – that the exemption does not apply when an electric utility adds telecommunications facilities to its lines – was in error.

PG&E claims we should focus on the physical nature of the work proposed, rather than the purpose to which the installation will be used: "The physical changes that occur when fiber is added to overhead utility structures are identical, whether the fiber is devoted to utility purposes or other purposes."[2]

PG&E also asserts that the Commission erred factually in concluding that the new fiber optic cable was not intended for the purpose of PG&E's own electric service and not related to existing use of the facilities. PG&E states that, "The MFNS Agreement allows PG&E to use a portion of the new fiber to reinforce its existing telecommunications system, thereby providing improved support to its existing electrical transmission system."[3] PG&E explains that, "the installation at issue will upgrade PG&E's internal communications system and permit intracompany communications over areas not currently served with optical fiber capabilities."[4]

Finally, PG&E challenges the way in which D.03-05-077 distinguishes prior Commission precedent. The Commission found in D.03-05-077 that certain old cases were not precedential because later cases had acknowledged that the Commission's view toward CEQA had evolved over time.

We discuss each of these issues in turn below.

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[2] *Petition of Pacific Gas and Electric Company for Modification of Decision 03-05-077* (PG&E Petition), filed June 20, 2003, at 6.

[3] *Id.* at 12.

[4] *Id.* at 13.

## III. Discussion

### A. CEQA Exemption's Application to New Uses

CEQA exemptions should be interpreted narrowly, in order to ensure that the environment is protected to the maximum extent possible.[5] We disagree with PG&E that a new use – such as telecommunications – on existing electric lines is a "minor alteration of an existing facility." Such an interpretation could create a huge loophole in CEQA regulation, allowing electric utilities to install telecommunications facilities at will.

Telecommunications is not an "existing" use of power lines used to distribute or transmit electricity. Such a conclusion is consistent with *County of Amador v. El Dorado County Water Agency*.[6] That case involved the sale of a hydroelectric project as part of a plan to increase water supply. The court found that a Class 1 CEQA exemption did not apply because a shift in the project from non-consumptive to consumptive water use was a change in project function and purpose, and not a negligible expansion of current use.

In this case, the existing use of the facilities is for the function and purpose of providing electric service. To add fiber optic equipment that will allow for the provision of competitive telecommunication services is a shift in that basic function and purpose, and outside the parameters of the Class 1 exemption consistent with the reasoning in *County of Amador.*

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[5] *McQueen v. Board of Directors,* (1988) 202 Cal. App. 3d 1136, 1148.

[6] (1999) 76 Cal. App. 4th 931.

Moreover, the Class 1 exemption is only available to projects that involve "negligible or no expansion" of existing use.[7] Here, the existing use is an electric line, not a fiber optic telephone network to be used by another provider to serve the public. The installation of telecommunications facilities is a fundamental change in the character of the use being made of PG&E's facilities. It is not a "negligible change" and represents expansion of the existing use of PG&E's facilities.

Requiring CEQA review of the installation of telecommunications facilities in this case does not run counter to our policy that we should encourage joint use of electric facilities with telecommunications providers. It just means that CEQA applies and that the change in use should be analyzed for potential harm to the environment. Thus, we reject PG&E's first claim.

### B. Claimed Factual Error

We did not err in D.03-05-077 when we found that the installation was inconsistent with existing uses. As we established in the decision, the key reason for the installation was to close MFNS' fiber optic loop around the San Francisco Bay Area. While it is true that PG&E obtained in return for this benefit to MFNS an agreement to use certain fibers, payment ran from MFNS to PG&E and not the other way. MFNS needed the San Francisco Bay crossing to complete its network and paid PG&E to obtain this benefit. Thus, the Agreement primarily benefited MFNS and the use was a new, telecommunications-related use requiring CEQA review.

[7] CEQA Guideline 15301.

### C. Prior Precedent

We adequately explained in D.03-05-077 why prior cases were distinguishable for purposes of the decision:

> "[T]he addition of dozens of carriers into the marketplace has made regulatory oversight more challenging where regulation is still required. These circumstances have motivated the Commission to reevaluate its application of CEQA. The Commission has recently begun taking a more active role in environmental oversight.
>
> "Implicit in our foregoing statements is an acknowledgement that our prior CEQA decisions are no longer fully relevant. We believe it is better to comply fully with CEQA than to adhere to prior policies and decisions that did not take full account of our obligations to protect the environment. Even the 2000 decision relied on old precedent that is no longer in conformity with our more in-depth approach to environmental review."

PG&E claims the reason those cases were distinguishable was unrelated to our findings in D.03-05-077: "D.02-08-063's concern for reevaluating CEQA policies and practices and for ensuring 'sound environmental practices' was not derived from concern that long-held categorical exemptions were outdated. . . ."[8]

PG&E is incorrect. We believe that the idea of "a more active role in environmental oversight" includes ensuring that categorical exemptions are not applied so broadly that projects with a clear potential for environmental impact are made to fit within the exemption.

Here, there is no doubt that the work PG&E did to string fiber optics across the Bay required environmental review. We opted to deem the BCDC

[8] *Id.* at 9.

consideration of the project, coupled with PG&E's consultation with numerous other resource agencies, adequate review under the circumstances to ensure that no environmental harm would come from the fiber optic cable's installation.[9] We are not persuaded to change our decision given the circumstances present here.

## IV. Comments on Draft Decision

The draft decision of Administrative Law Judge (ALJ) Thomas in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. PG&E filed comments on December 18, 2003. PG&E pointed out factual errors in the draft decision, which we have corrected. Otherwise, PG&E disagrees with the concept that a change in "existing use" – *e.g.*, from use of facilities for the transmission of energy to use for facilitating telecommunications – renders the project ineligible for a Class 1 CEQA exemption.

Because the exemption only applies where there is "negligible or no expansion of use," the change in use does not fall within the exemption. PG&E's attempt to distinguish *County of Amador, supra,* does not persuade us to change the draft decision. There, as here, the use of the facilities changed. The court's holding was predicated simply on that change in use: "A project that shifts from nonconsumptive to consumptive use is not a negligible expansion of current use. It is a major change in focus, and thus does not fall within the 'existing facilities' categorical exemption." 76 Cal. App. 4th at 967. Thus, we do not find *County of*

[9] D.03-05-077, *mimeo.*, at 9.

*Amador* to be distinguishable, and retain the draft decision's conclusion that CEQA review of the installation was required.

## V. Assignment of Proceeding

Loretta M. Lynch is the assigned Commissioner and Sarah R. Thomas is the assigned Administrative Law Judge in this proceeding.

## Finding of Fact

PG&E introduced no new facts that would cause us to alter D.03-05-077.

## Conclusion of Law

We should not alter D.03-05-077.

## O R D E R

**IT IS ORDERED** that:

1. The Petition of Pacific Gas and Electric Company for Modification of Decision 03-05-077 is denied.
2. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.